

Why the Debate between Kumm and Armstrong is about the Wrong Question

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In a recent series of exchanges, [Mattias Kumm](#) argued for the existence of a legal duty of the European Council to nominate the *Spitzenkandidat* for the presidency of the Commission, whereas [Kenneth Armstrong](#) denied the existence of such a duty under EU law. In the following text I am going to argue that the existence of a legal duty is the wrong question to address. Instead, we should answer two other questions: (1) whether we should wish the nomination of the *Spitzenkandidat*, (2) whether there are procedural possibilities to enforce such a wish. Both of my answers to these two questions will be in the affirmative, thus turning the Kumm–Armstrong debate into an ontological exercise.

The two main reasons why democracy won the contest for the leading legitimacy claim in the modern world are its capacity to generate loyalty and its self-correction potential. Citizens must have the feeling that they have a decisive say in order to build up their loyalty towards the political community and they should also be able decide about who is leading their government so they can correct policies by new personal choices. Thus, if we want the EU to use democracy's virtues of generating loyalty and self-correction, then the European Commission (conceptualised as the government of the EU) should be elected solely by the European Parliament. If this is not the case, then – as Kumm rightly put it – it is quite difficult to explain voters what the purpose of them going to the ballot was (and will be in the future) at all. Any choice which would be different from the original *Spitzenkandidat* would be a slap in the face for the European electorate and would make Eurosceptic voices more plausible than ever. It is very difficult to argue (leaving aside the existence of a legal duty to do so, at least for now) that it would not be highly desirable to have the *Spitzenkandidat* as the next Commission president if we do not want to dramatically erode the democratic credit of the EU.

According to Armstrong, a modification of the treaties would be inevitable in order to force the European Council to accept this. As I have previously [argued](#), this approach is wrong: the mere black letter legal situation is not always decisive if we want to know whether we have a parliamentary regime or not. If we have a look at the U.K., there is currently (and there was) no legal rule prescribing that the monarch has to appoint as Prime Minister the person who commands the majority support of the House of Commons. It is happening though, by a (legally non-binding) constitutional convention.

This is exactly what we need now in the EU. The election of the Commission president should depend on which MEP faction(s) have the most seats, and who they (in coalition) want to see in the seat of the Commission president. But how can the European Council be forced adopt such a practice? Simply accusing the members of the Council of antidemocratic behaviour can probably not force them, as they would refer to the text of TEU which – as Armstrong rightly pointed out – actually favours a non-parliamentary solution. So the solution would simply be, that the European Parliament by using its veto possibilities (or to put it more bluntly: blackmailing capacity) only accepts the one person as candidate by the European Council whom the majority of the European Parliament supports. All other candidates will be refused. And, of course, the same logic applies for the members of the Commission.

This logic is not unknown to the EU institutions: Before Mr. Barroso became the President of the Commission for the first time (2004), the European Council intended to propose a person from the political left, even though the elections to the European Parliament had been won by the political right. The European Parliament vetoed the idea, and the European Council had to choose someone from the political right. It would only be one further step in the same direction (an important and big step though), if the European Parliament managed to do what they are currently doing, i.e. that they will accept only one particular person for that position. In 2004, a second event during the formation of the European Commission also showed that the European Parliament has the strength to substantially influence the composition of the Commission: criticism from the European Parliament on one of the commissioner candidates (Rocco Buttiglione) led Barroso to change its membership and to alter the distribution of portfolios. But what was missing until now is the EU electorate knowing before the European Parliament

elections the *Spitzenkandidats*, so they can choose their parties in light of this. Until now. The conflict driven situation today in which we have a *Spitzenkandidat* who was already announced well before the elections and a reluctant European Council is exactly what, for a long time, I was hoping for: who has the final say on the issue can now be clarified.

It is unlikely that anyone would be ready to risk being blamed for substantively delaying the establishment of a new Commission by initiating a court procedure, thus it is very unlikely that this institutional question will ever reach the Court, and even if it did reach the Court it would be suicidal for the EU as a whole and also opposing all former democratising and parliamentarising tendencies in case law for the Court to deny the Parliament this privilege.

We can achieve a parliamentary system under the current EU legal regime, if politicians in the European Parliament have the ambition to take the necessary steps. If this happened, then the EU government system would become similar to some extent to today's German system, where a party coalition in the lower chamber supports the government, and the upper chamber takes part substantively only in the legislative process but not in the formation of the government.

If the EU becomes a parliamentary system as I just described above, then it will only be an academic question whether it follows from the treaties as a legal duty or whether it is just political reality and non-legal constitutional convention which were merely allowed by the legal rules. Thus the debate between Armstrong and Kumm becomes a purely ontological question about the nature of certain rules.

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SUGGESTED CITATION Jakab, András: *Why the Debate between Kumm and Armstrong is about the Wrong Question*, *VerfBlog*, 2014/6/20, <http://verfassungsblog.de/debate-kumm-armstrong-wrong-question/>.

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